No. 602

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Supreme Court of the United States.

OCTOBER TERM, 1951.

SILVIO AMOROSO,
PETITIONER,

v.

~~COLLECTOR~~ COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST CIRCUIT.

(SUPPORTING BRIEF INCORPORATED.)

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To the Honorable the Justices of the Supreme Court of the United States:

The petitioner, Silvio Amororso, prays for a writ of certiorari to review the judgment of the Court of Appeals for the First Circuit entered January 8, 1952, in the case between the above-named parties, docketed as No. 4594.

Opinions Below.

The memorandum opinion of the Tax Court of the United States is not reported officially but is reported in Sec. 51,058 P-H Memo T.C. 1951 and printed in the Record, p. 10-15. The opinion of the Court of Appeals is reported in 192 Fed. 2d, February , 1952, No. . It is printed in the Record, p. 41-47.

Jurisdiction.

This Court has jurisdiction under United States Code Title 28, Section 1254.

This application is made within the ninety-day period required by Section 2101.

Questions Presented.

1. Whether the denial of full credibility to certain aspects of the uncontradicted testimony of the petitioner, who was the only witness, by a judge who presided over no part of the trial is a denial of due process of law in violation of the Fifth Amendment to the Constitution of the United States.

2. Whether an individual taxpayer whose place of residence and principal place of business are both situated within a town which is adjacent or near to a city is, or is not, under the provisions of Section 23 (a) (1) (A) of the Internal Revenue Code, as amended, entitled to deduct from his gross income as business or traveling expense the cost of meals wherever necessarily and reasonably incurred in pursuit of his trade or business outside the territorial limits of that town.

Statute Involved.

Internal Revenue Code:

Sec. 23. Deductions from Gross Income.

In computing net income there shall be allowed as deductions:

(a) Expenses.**

(1) [Added by Section 121 (a) of the Revenue Act

of 1942, c. 619, 56 Stat. 798] Trade or Business Expense.—

(A) In General.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or it not taking title or in which he had not equity.

* * * * *

(26 U.S.C. 1946 ed., Sec. 23)

Statement.

During the entire year 1945, the petitioner resided in the Town of Milton, Massachusetts, at his home at 29 Washington Street (R. 19); he was the representative of several manufacturers in the automotive industry, selling their parts and equipment on a commission basis to some 250 automotive wholesalers; he sold only in and traveled entirely within New England in connection with his selling (R. 23, 27), but was outside this area many times for conventions, visits to the factory (R. 23); most of his work was away from home and he had no office other than at his home (R. 22), where his wife was his secretary and kept his books (R. 35); in addition to the telephone at his home (Petitioner's Exhibit 2), he had a listing in the telephone directory in South Boston, which he used to receive tele-

phone calls and to make calls out for which he paid (R. 11, 14, 24).

Petitioner usually tried to plan his work to go away on a Monday and come home on Thursday, or go away on Tuesday and come home on a Friday, spending Friday and Saturday, or Saturday and Monday, calling on his customers in the Metropolitan Boston area (R. 11, 33).

The amount deducted by him in his tax return as business expense for the cost of meals represented the cost of meals wherever consumed in New England, including those consumed in Boston (R. 32).

Petitioner filed his income tax return for the year 1945 with the Collector of Internal Revenue for the District of Massachusetts (Respondent's Exhibit A; R. 6-9).

Notice of deficiency was mailed to the petitioner on February 16, 1949, disallowing deductions claimed by the petitioner as business expense in his 1945 return in the amount of $4,106.59 and determining a deficiency of $1,655.27. This disallowance was based on the failure of the taxpayer to substantiate his claimed deductions (Respondent's Exhibit A; R. 6-9).

The petitioner testified to each item of business expense claimed in his 1945 tax return and introduced in support records made by him in the regular course of his business, together with such original receipts and vouchers as were then available (R. 19-26, 35, 36). Where his recorded expenditures were partially or wholly unsupported by original receipts and vouchers, explanation was usually made (R. 22-25).

The petitioner was the only witness at the trial and was not cross-examined by counsel for the respondent with respect to whether the expenditures claimed as deductions had actually been made or whether they truly had been made in connection with carrying on his business. His

testimony stands without contradiction in any manner.

The trial was completed before the late Honorable Byron B. Harlan, Judge of the Tax Court of the United States, following whose death the decision was rendered by the Honorable Arnold Raum, Judge of that Court (R. 10-15).

After stating: "Although we think petitioner actually made many of the expenditures for which he claims deductions, some of them are not adequately substantiated, and we are not satisfied that all of them were made in connection with his trade or business," (R. 14), the Judge of the Tax Court, who had not heard the petitioner's testimony or observed his demeanor, allowed as deductions several smaller items of business expense in the full amount claimed by the petitioner, but allowed most of the other items, excepting "commissions paid" and "meals" (which were dealt with specifically) in amounts substantially less than those claimed by the petitioner (i.e. Hotels, Railroad, Postage and Mailing, Telephone, Tips, Miscellaneous Gas and Oil, Car wash and repair).

The petitioner claimed $1,676.25 as a deduction for the cost of meals incurred by him in connection with carrying on his business. The Tax Court, treating this item specifically, allowed only $1,224.00 of the amount claimed. Evidently satisfied that the petitioner had actually spent the entire amount claimed for meals and presumably that this claimed expenditure in fact was wholly made in connection with the petitioner's trade or business, as well as that it was necessary and reasonable—notwithstanding the complete absence of supporting receipts for this item—the Tax Court found that—

(1) the amount of petitioner's claim "includes many expenditures made for meals during the days of each week which the petitioner spent in the Greater Boston area" (R. 12), and (2) "the petitioner's home and principal place

of business was located in the Greater Boston area" (R. 12, 13), and ruled that the approximated "amounts expended for meals in this area are not traveling expenses incurred while away from home in the pursuit of trade or business, deductible under the provisions of Section 23 (a). They represent personal expenses within Section 24 (a) (1) Internal Revenue Code, and are not deductible." (R. 13)

The Court of Appeals, in considering the disposition by the Tax Court of the items of petitioner's business expenditures, other than "meals" and "commissions paid," which were not allowed by the Tax Court in the full amount claimed by the petitioner, said, "We are not convinced that the Judge of the Tax Court by whom the case was decided 'passed expressly upon the credibility of the petitioner' who was the sole witness. It does not appear to us that the credibility of the petitioner was questioned or involved in the Tax Court's determination of the case." (R. 46)

In dealing with the petitioner's claim for deduction of the cost of meals consumed by him in connection with his business wherever incurred outside the limits of the Town of Milton, the Court of Appeals said, ". . . We do not agree that the petitioner is 'away from home' in the tax sense when he steps over the boundary of Milton . . . That the meals were purchased within a reasonable radius from the petitioner's home is clear . . . The petitioner was near enough to his home so that he could return there from Boston without extensive travel . . . Petitioner's situation resembles that of a commuter when he is in the Boston area. Commuter's expenses are not allowable as deductions . . . The cases cited by the petitioner . . . emphasize the idea that distance is an important factor in satisfying the 'while away from home' requirement." (R. 45)

Specification of Errors.

I. Partial disallowance of the amounts of certain items of business expense claimed as deductions by the petitioner (excepting "meals" and "commissions paid") upon the expressed ground that the Tax Court was satisfied that the petitioner "actually made many of the expenditures for which he claims deductions" and was not satisfied that "all of them were made in connection with his trade or business" was error because—

(a) the Court thus passed expressly upon the credibility of the petitioner, and

(b) in so doing, the Court, not having presided over any part of the trial at which the petitioner was the sole witness and testified without contradiction in any manner, denied the petitioner due process of law in violation of the Fifth Amendment to the Constitution of the United States.

II. Disallowance as a deduction for business or traveling expense of the cost of meals consumed by the petitioner within the "Greater Boston area" on the ground that the Town of Milton, in which both his residence and principal place of business were situated, was within that area was error because—

(a) the term "Greater Boston area" lacks the concise delineation of the area embraced within it necessary to constitute a legal definition; and

(b) he was "away from home" within the meaning of "home" as used in Sec. 23 (a) (1) (A) when he was outside the limits of the Town of Milton.

Reasons for Granting Writ.

I.

As To First Specification Of Error.

The decision below involves denial of due process of law in violation of the Fifth Amendment to the Constitution of the United States and is contrary to a prior decision of this Court and all decisions of Courts of Appeals.

In *Morgan* v. *United States*, 298 U.S. 468, it was said by this Court, at p. 480:

> The requirement of a "full hearing" has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts.

and at p. 481:

> For the weight ascribed by the law to the findings—their conclusiveness when made within the sphere of the authority conferred—rests upon the assumption that the officer who makes the findings has addressed himself to the evidence and upon the evidence has conscientiously reached the conclusions which he deems it to justify. That duty cannot be performed by one who has not considered evidence or argument. It is not an impersonal obligation. It is akin to that of a judge. The one who decides must hear.

Accordingly, in *Morgan* v. *United States*, 304 U.S. 1, this Court set aside as in violation of the due process clause of the Fifth Amendment findings and orders of the Secretary

of Agriculture who had not attended the hearings upon which they were based.

Following the principle of *Morgan* v. *U.S.*, the courts in three cases have set aside decisions in which the deciding judge or administrative officer had considered the evidence, but for one reason or another had not seen or heard the witnesses.

Federal Deposit Insurance Corp. v. *Siraco*, 174 Fed. 2d 360, 363, C.A. 2 (1949)

Smith v. *Dental Products Co.*, 168 Fed. 2d 516, C.A. 7 (1948), certiorari denied, 322 U.S. 743.

Buchsbaum & Co. v. *Federal Trade Commission*, 153 Fed. 2d 85, 87, C.C.A. 7 (1946).

But, in the following cases, the petitioner was denied a new trial.

Halle v. *Commissioner*, 175 Fed. 2d 500, 504, C.A. 2 (1949), certiorari denied, 338 U.S. 949, in which the petitioner's testimony was evasive, contradicted and thoroughly discredited.

St. Louis Southwestern Ry. Co. v. *Henwood*, 157 Fed. 2d 337, C.C.A. 8 (1946), certiorari denied, 330 U.S. 836, rehearing denied, 331 U.S. 870, in which the evidence relied upon by the petitioner was contradicted by prior inconsistent written statements.

Seaside Improvement Co. v. *Commissioner*, 105 Fed. 2d 990, 992, C.C.A. 2 (1939), certiorari denied, 308 U.S. 618, in which there was conflicting testimony of experts and also a statement in the nature of an admission made by petitioner in argument of the case below.

Powell v. *Commissioner,* 94 Fed. 2d 843, 845-846, C.C.A. 1 (1938), in which petitioner was sole witness on question of intent but had acted in a manner not consistent with his stated intent.

Davidson v. *Commissioner,* 91 Fed. 2d 516, 518, C.C.A. 5 (1937), in which, on testimony of facts, no issue of credibility of any witness appeared.

These decisions, however, seem to limit the principle of *Morgan* v. *U.S.* by denying a new trial notwithstanding that the judge who decided did not see and hear the witnesses where the record discloses that the testimony in favor of the party seeking a new trial is contradicted by evidence so discrediting as to render it unworthy of belief by any tribunal.

The decision below is contrary to the principle of *Morgan* v. *U.S.* and to the apparent requirements of the foregoing cases.

The Revenue Act of 1924[1] provided that "Notice and an opportunity to be heard shall be given to the taxpayer and the Commissioner . . ." and, by the provisions of the Change of Name Act,[2] this requirement became applicable to the Tax Court of the United States. This is the equivalent of a "full hearing" required by the pertinent Act of Congress to be given by the Secretary of Agriculture in *Morgan* v. *U.S.*

The petitioner testified below to the amounts he had spent for various purposes in connection with his business as a manufacturers' representative, which required his traveling in the New England states continually. The respondent did not cross-examine him with respect to the amounts he stated he had thus spent. His testimony was without self-

[1] 43 Stat. 336, June 2, 1924, c. 234, Title IX, sec. 900 (h); 26 U.S.C. 1100.
[2] 56 Stat. 957, Oct. 21, 1942, c. 619, Title V, sec. 504; 26 U.S.C. 1100.

contradiction. The absence of supporting receipts and vouchers did not constitute contradictory evidence. The respondent offered no witnesses. The record contains no evidence tending to contradict or to discredit the petitioner in any respect. His credibility was not affirmatively challenged. It was accordingly argued below in behalf of the petitioner that the respondent had made no issue of his credibility.

In these circumstances, the petitioner's credibility as an issue in this case was exclusively within the judicial province of the judge who saw and heard him.

Nevertheless, in partially disallowing the amounts of several items of business expense as claimed by the petitioner, the judge of the Tax Court, who had never seen him nor heard him testify, stated in substance (R. 14) that he did not believe that the petitioner actually made all of them or that all of them had been made in connection with his business.

By so doing, the Court expressly denied full weight of credibility to the uncontradicted testimony of the only witness in this case.

In no case previously decided by any Court do these circumstances exist. Here disbelief of the petitioner, whose testimony was clearly not self-evident falsehood, could properly be predicated only upon those incommunicable impressions and reactions that can be acquired only from hearing the witness and observing his demeanor.

As the deciding judge below had not had that opportunity, it can be concluded only that the evidence of record in favor of the petitioner here is such that it is beyond the realm of disbelief by any tribunal. The failure of the judge below to give full credibility to the testimony of the petitioner with respect to all items claimed by him as business

expense therefore denied the petitioner due process of law and was reversible error.

The petitioner therefore urges reversal of the decision below by an authoritative decision of this Court of the question of constitutional law involved in the first specification of error.

II.

As To Second Specification Or Error.

1. Prior to the decision below, interpretation of the word "home" in Sec. 23 (a) (1) (A), Internal Revenue Code, for the purpose of determining deductibility of business or traveling expenses incurred by a taxpayer whose residense is in one city and whose place of business is in another, had already become the subject of a familiar, and thus far unsettled, controversy. In three earlier decisions, Courts of Appeals ruled that it means the city in which the taxpayer's actual permanent residence is situated, and nothing more. These allow the taxpayer to deduct from gross income, as business or traveling expense, the cost of meals, lodging, and transportation incurred by him in the pursuit of his business in the other city, without regard to the distance between the two cities or to whether he chooses or is obliged to be there, or how often or for how many days during the tax year he may remain there.

Coburn v. *Commissioner*, 138 Fed. 2d 763, C.C.A. 2 (1943)

Wallace v. *Commissioner*, 144 Fed. 2d. 407, C.C.A. 9 (1944)

Flowers v. *Commissioner*, 148 Fed. 2d 163, C.C.A. 5 (1945)

The contrary view, generally adopted in administrative rulings and decisions of the Tax Court results in disallowance of the deductions claimed for such expenditures. Analysis of the *Barnhill* case (infra) discloses that this "view" is actually composed of two alternative propositions, either of which, although couched in language different from that of the other, accomplishes the same theoretical and legal result:

> (1) by interpreting the meaning of the word "home" to include also any city or place in which the taxpayer may have a business headquarters other than that in which his actual residence is situated (*Peters*, 19 B.T.A. 901 [1930], but see *Powell*, 34 B.T.A. 655 [1936] and *Schurer*, 3 T. C. 544 (1944]);

or

> (2) by accepting the word "home" as meaning the city or place of the taxpayer's actual residence but interpreting Section 23 (a) (1) (A) to imply that the taxpayer's home and place of business MUST both be in the same general locality and ruling that, when they are not, such expenditures are not necessary to the prosecution of the taxpayer's business.
>
> *Barnhill* v. *Commissioner*, 148 Fed. 2d 913, C.C.A. 4 (1945)

Of these two propositions (1) is expressly recognized in the *Barnhill* case but (2) is actually the basis of the decision, in which the Court, at p. 917, said:

> But it is not reasonable to suppose that Congress intended to allow as a business expense those outlays

> which are not caused by the exigencies of business but by the taxpayer in having his home for his own convenience at a distance from his business. Such expenditures are not essential to the prosecution of the business . . . This is not the same as saying that the word "home" means "place of business," although in most cases when the deductions for traveling expense are claimed, the result will be the same.

The court there concluded that the expenditures of the justice of the Supreme Court of North Carolina for hotel accommodations and meals at Raleigh and for transportation between that city and his home, about sixty miles away, during the more than two hundred days of the tax year on which the justice deemed it necessary for him to be in that city to perform his judicial duties were, nevertheless, not necessary to the prosecution of those duties and disallowed them as deductions for business expense in toto.

The basis and theory for the conclusion that these expenditures were not necessary to the prosecution of the petitioner's judicial duties are found in the following statement of the Court, at p. 917:

> Doubtless these considerations give rise to the regulations set out above which confine the deductions for traveling expenses to those which are reasonable and necessary and expressly forbid the deduction of commuter's fares. This prohibition indeed would be unauthorized if the word "home" were given its ordinary meaning for there can be no doubt that in a literal sense *one who lives in the suburbs and does business in the city* must pay travel expenses while absent from his home in pursuit of his business. (Italics supplied.)

and, at p. 917:

> . . . the decision of the Tax Court cannot be affirmed without holding that in allowing deductions for traveling expenses to one who is away from home on business, the statute implies that the home and the place of business must be in the same general locality. We think that the statute must be given this construction and that it may be done without arbitrarily construing the word "home" as synonymous with the term "place of business."

Thus, in the *Barnhill* case, the Court expressly recognized proposition (1) above, noted it to be an arbitrary construction and refrained from adopting it; but then, commenting upon the effect upon the administrative regulation forbidding the deduction of commuters' fares if the word "home" were given the ordinary meaning, the Court resorted to proposition (2) above, fully realizing, however, that under it "the result will be the same" as under proposition (1).

It therefore appears that the conflict between the decisions of the Courts of Appeals prior to the decision of this Court in *Commissioner* v. *Flowers*, (infra) arose not alone over interpretation of the meaning of the word "home" as used by Congress in Section 23 (a) (1) (A) but as well from concern about the effect that such interpretation might have upon the meaning of last sentence of Section 29.23 (a)-2, Treasury Regulations 111, which forbids deduction of "commuters' fares" as business expense.

The Court, in the *Barnhill* case, evidently assumed "one who lives in the suburbs and does business in the city" to be a commuter who could not deduct his "commuters' fares" under Treasury Regulation 111. But to conclude,

because a "commuter" in this sense cannot deduct "fares", that any taxpayer who does not fall within this category also cannot deduct business or traveling expenses while actually away from home is to place every taxpayer into the category of the "commuter" and to divest the language of Congress—"traveling expenses (including the entire amount expended for meals and lodging) while away from home"—of all meaning. Thusly, in any such case, it may be ruled that the taxpayer "chose" to live elsewhere than in the "same general locality" in which his actual residence is located for his own personal convenience and that, therefore, the additional expenses incurred outside that "same general locality" were unnecessary to the prosecution of his or his employer's business and acordingly not deductible. It seems doubtful that Congress intended such a result.

Propositions (1) and (2) above are not only identical in tax result; they are identical in theoretical effect. By (1) "home" is deemed to follow the taxpayer wherever he has a place of business away from home. By (2) the taxpayer is deemed never to be away from his home. Each has the effect of keeping the taxpayer's home and place of business in the "same general locality," whatever may be the fact. Each nullifies the words of Congress and destroys the very relief intended to be given in these situations; the one, by distorting the meaning of "home"; the other, by interpreting Sec. 23 (a) (1) (A) as a whole in such a manner as to make it consistent with an assumed meaning of the as yet judicially untested regulation forbidding deduction of commuters' fares.

In the existing state of this controversy, each taxpayer's case must in the last instance be decided upon its own facts. Administrative representatives cannot know the boundary between their duty to enforce the revenue laws and their duty to afford to the taxpayer the relief which those laws

also here provide. The need is for a rule that can be clearly understood by administrative representative and taxpayer alike. But, as this controversy hinges upon an evident collision between an assumed meaning of a regulation of the Treasury Department promulgated under a general authorization of Congress and the meaning of a provision of a specific Act of Congress, it is apparent that it cannot be determined authoritatively except by a decision of this Court.

2. The only decision of this Court appears to have been considered in subsequent decisions of the lower courts as having settled this controversy.

In *Commissioner of Internal Revenue* v. *Flowers*, 326 U.S. 465, this Court expressly because of this conflict granted certiorari, but, deeming it there "unnecessary to enter into or to decide this conflict," decided that case upon its own facts. There is not, however, in the opinion of the majority, any express advertence to that phase of the conflict which hinges upon the assumption in the *Barnhill* case that Sec. 23 (a) (1) (A) implies that the taxpayer's place of residence and place of business must be in the "same general locality." Referring to the litigation engendered by the meaning of the word "home" and citing the *Barnhill* case, this Court, at p. 472, said:

> The Tax Court and the administrative rulings have consistently defined it as the equivalent of the taxpayer's place of business.

Without further analysis or reference to the *Barnhill* case, this Court proceeded to decide the case on its own facts and stated, at p. 473:

> The added costs in issue, moreover, were as unnecessary and inappropriate to the development of the railroad's business as were his personal living costs in Jackson. They were incurred solely as the result of the taxpayer's desire to maintain a home in Jackson while working in Mobile . . .

Without doubt the reasoning of the majority of this Court and the result reached on the facts of the case are consistent with the doctrine of the *Barnhill* case. But there is nothing in the opinion to indicate that this Court was there applying that doctrine and much less that this Court was affirming it. It was expressly stated that the conflict between the decisions of the lower courts was not then being decided. Nevertheless, in subsequent decisions the lower courts do appear to have assumed that the decision in *Commissioner* v. *Flowers* did settle the controversy and have cited it as authority for the establishment and application of the doctrine of the *Barnhill case*.

In *York* v. *Commissioner*, 160 Fed. 2d 385, C.C.A. DC (1947), the Court, at p. 385, said:

> The Tax Court was clearly right in ruling against petitioner. A man's living expenses while he is carrying on his business at his regular place of business are personal and not business expenses. This is true even though he maintains, as the petitioner did at first, a place of abode so distant from his place of business that daily commuting is impossible. *Com'r* v. *Flowers*, ... Petitioner points out that Flowers maintained his remote establishment from choice whereas petitioner brought his family to Washington as soon as he could. We think this difference immaterial. Petitioner neither

maintained a place of abode in Atlanta, nor brought his family to Washington, in order to do the work which he was employed to do. Therefore the expenses which these arrangements caused were not incurred either

(1) "in carrying on any trade or business" or

(2) "for the production or collection of income."

In *Bercaw* v. *Commissioner*, 165 Fed. 2d 521, C.C.A. 4 (1948), at p. 523, the court said:

> In *Commissioner of Internal Revenue* v. *Flowers* . . ; the Supreme Court has held that in order to constitute a deductible travel expense, " The exigencies of business rather than the personal conveniences and necessities of the traveler must be the motivating factors."

Similarly, *Ney* v. *Commissioner*, 171 Fed. 2d 449, C.A. 8 (1948), certiorari denied, 336 U.S. 967 (1949)

And in *Andrews* v. *Commissioner*, 179 Fed. 2d 502, C.A. 4 (1950), the Court, at p. 504, said:

> This statute has been frequently considered by the courts and it is now established that an expenditure is not deductible unless it is incurred in the pursuit of a trade or business, and that additional living expenses of a taxpayer at his place of business, who maintains a home elsewhere for reasons of personal convenience, are not deductible as traveling expenses since they are not required by the exigencies of the business but are the result of his own personal choice. *Commissioner* v.

Flowers, 326 U.S. 465, 472, 474 . . . ; *Barnhill* v. *Commissioner* , . . .

See also: *Albert*, 13 T.C. 129 (1949)
Jones, 13 T. C. 880 (1949)
Osteen, 14 T. C. 1261 (1950)

The aggregate effect of lower court decisions since the decision of this Court in the *Flowers* case makes it presently impossible, whatever may be the surrounding conditions and circumstances, for a taxpayer to show necessity for or to justify establishment of living accommodations in connection with a place of business outside the general locality in which he has his residence for whatever period of time except as a matter of personal choice and convenience. Until this Court shall enter into and decide this conflict, it is not unreasonable to suppose that the lower courts will continue to consider it as having been settled by this Court in favor of the rule of the *Barnhill* case.

3. The decision below introduces into this conflict a new proposition which originates directly from within the existing conflict.

That the location of the petitioner's place of residence and principal place of business coincide within the Town of Milton would at once appear to reconcile all theories heretofore in conflict. Under that of the *Coburn* and *Wallace* cases, Milton is his home. So it is also if the meaning of the word "home" is interpreted to include his principal place of business. Likewise the rule of the *Barnhill* case by which section 23 (a) (1) (A) is assumed to imply that the two must be within the "same general locality" is eminently satisfied seemingly beyond any conceivable occasion for definition of that phrase, for, not only are both within the same town,

they are in the same dwelling house there.

As the petitioner is not a "commuter" in the sense that he travels to and fro daily or regularly between his residence and a place of business, it would seem to follow without question in fact or in law that, when he is away from Milton traveling in pursuit of his business of calling upon and rendering service to his customers, he is away from home as clearly when he is in or near Boston as when he is not and that therefore the cost of meals as well as of transportation, wherever incurred in so doing, is deductible traveling or business expense.

The very coincidence of the location of the petitioner's home and principal place of business urges, with an inherent force more convincing than any argument, the conclusion that, for the purpose of determination of the petitioner's case in any event, if not also of resolving the underlying conflict, the word "home" means the town or city in which the taxpayer's actual permanent residence is situated.

Nevertheless, the Tax Court ruled that:

> The petitioner's home and principal place of business was located in the Greater Boston area. The amounts expended for meals in this area are not traveling expenses incurred while away from home in pursuit of his trade or business.

A similar ruling was not, but might have been, made with respect to the petitioner's transportation expenses. Although the Tax Court did not expressly so indicate, its ruling was in effect equivalent to defining the word "home" on the facts here to include the so-called "Greater Boston area." As such, the decision below introduces into the

underlying conflict a new and original concept of the meaning of that word.

Beyond doubt also the Tax Court here recognized that the coincidence of the petitioner's residence and principal place of business in the Town of Milton compelled definition of the area embraced within the meaning of the phrase "same general locality" as used on p. 917 of the *Barnhill* case (supra). In that case, because the distance between the two places was about sixty miles, definition of this expression was not required. But here, because the location of the two coincide in a town, the Tax Court, unwilling to adopt the rule of the *Coburn* case, could reach the result below only by ruling that the amount disallowed as a deduction represented the cost either (1) of meals consumed within the "same general locality" in which the petitioner's home and principal place of business were thus located or, upon the evidence below developed in cross-examination, (2) of meals consumed within the "Greater Boston area." The meaning and effect of either is the same. Thus the proposition below is not only a new ramification of the existing conflict; it also originates directly from it and has its foundation, as does the *Barnhill* case, in judicial hesitancy to interpret the meaning of "home" in any manner that might tend to limit the assumed meaning of the word "commuter" in the regulation forbidding deduction of commuters' fares as "one who lives in the suburbs and does business in the city."

For the court in the *Barnhill* case in effect expressly so defined the term "commuter"[3] when it indicated its reason for adopting the theory that section 23 (a) (1) (A) implies that a taxpayer's residence and place of business must be in the "same general locality." And the court below has done likewise by having in effect identified "same general

[3]See italics, p. 14, supra.

locality" for the first time in a judicial decision as "Greater Boston area." In this respect the decision of the Tax Court may therefore also be taken to imply a finding or ruling that the petitioner was a "commuter" even though the opinion does not mention that word, because, in the language of the court in the *Barnhill* case, the petitioner here was "one who lives in the suburbs and does business in the city." The petitioner contends, however, that he was not a commuter in the proper meaning of that word.

It now becomes apparent that, by application of the second proposition of the *Barnhill* case or of its clear derivative, the decision below, expenditures for meals, lodging, and transportation may in any given case be ruled not deductible on the ground that they are unnecessary if the taxpayer's place of residence and place of business are far apart or that they have not been incurred "while away from home" if they are close together—and without inquiry or regard to whether the taxpayer is or is not a "commuter". For such expenditures under the *Barnhill* case are not necessary when the taxpayer's place of residence and place of business are not in the "same general locality" and under the decision below they are not incurred "while away from home" when the two are in the "same general locality"! And thus the *Barnhill* case and the decision below together provide the complete means by which the language of Congress in Section 23 (a) (1) (A) may be left entirely without meaning or effect in any case. Certainly the general authorization of Congress to promulgate Treasury Regulations was not intended to be exercised to this extent.

Furthermore, the decision below lacks the specific delineation essential to its validity as a principle of law. Neither the precise nor the approximate area embraced within the meaning of the term "Greater Boston area" is defined in the record (R. 30-33) or in the opinion below (R. 12, 13).

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 602

SILVIO AMOROSO, *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Tax Court (R. 10-15) is not officially reported. The opinion of the Court of Appeals (R. 41-46) is reported at 193 F. 2d 583.

JURISDICTION

The judgment of the Court of Appeals was entered on January 8, 1952 (R. 46). The petition for a writ of certiorari was filed on February 21, 1952.

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTIONS PRESENTED

1. Whether the Tax Court's proceedings were invalid because, following the death of the judge who had presided at the hearings, another judge was assigned to render the decision.

2. Whether the court below correctly affirmed the Tax Court's finding that taxpayer's home and principal place of business were in the Greater Boston area so that taxpayer was not "away from home" within the meaning of Section 23(a) of the Internal Revenue Code while he was in that area.

STATUTES INVOLVED

The applicable statutes are printed in the Appendix, *infra*, pp. 9-11.

STATEMENT

The pertinent facts as found by the Tax Court are as follows (R. 10-13):

Taxpayer, a resident of Milton, Massachusetts, is a manufacturer's representative in the automotive industry. During 1945, taxpayer traveled throughout New England calling on his customers. About 20 per cent of his customers were in the Greater Boston area. The remaining 80 per cent were in other parts of New England. (R. 10-11.)

Although taxpayer had a telephone listing at 36 Cummington Street in Boston and made and re-

ceived telephone calls there, practically all of his office work was done at his home in Milton (R. 11).

The taxpayer kept a weekly record of various expenditures made by him on a printed form, called a "Salesmen's Expense Record". Most of the expenditures recorded thereon were not substantiated by receipts. (R. 12.) An examination of the amounts recorded by taxpayer for meals indicated that the $1,676.25 deduction claimed for this item included many expenditures made for meals during the days of each week which taxpayer spent in the Greater Boston area. Taxpayer's home and principal place of business were located in the Greater Boston area. Of the $1,676.25 deduction he claimed for meals, $1,224 was spent outside the Greater Boston area; the rest represented the cost of meals purchased while he was in that area. (R. 12-13.)

Upon the basis of these facts, the Tax Court held (R. 13):

> The amounts expended for meals in this area [Greater Boston area] are not traveling expenses incurred while away from home in the pursuit of a trade or business, deductible under the provisions of Section 23(a). They represent personal expenses within Section 24(a)(1), Internal Revenue Code, and are not deductible.

Affirming this ruling, the court below also rejected the contention that there had been a denial of due

process because, following the death of the judge who had heard the case, another judge had been assigned to render the decision of the Tax Court (R. 41-46).

ARGUMENT

1. There is no merit in taxpayer's claim that he was denied due process because the death of the judge who had presided at the hearing necessitated the assignment of another judge to formulate the decision of the Tax Court. It is clear that this procedure was well within the Tax Court's power and that taxpayer was in no way prejudiced by its employment.

The courts of appeals have repeatedly rejected the contention that a Tax Court decision is invalid because made by a judge other than the one who presided at the hearing. *Halle* v. *Commissioner*, 175 F. 2d 500, 504 (C. A. 2), certiorari denied, 338 U. S. 949; *Seaside Improvement Co.* v. *Commissioner*, 105 F. 2d 990, 992 (C. A. 2), certiorari denied, 308 U. S. 618; *Davidson* v. *Commissioner*, 91 F. 2d 516, 518 (C. A. 5); *Foss* v. *Commissioner*, 75 F. 2d 326, 329 (C. A. 1); cf. *Garden City Feeder Co.* v. *Commissioner*, 75 F. 2d 804 (C. A. 8); *Standard Oil Co.* v. *United States*, 7 F. Supp. 301 (C. Cls.), certiorari denied, 293 U. S. 599. These decisions are supported, not only by the plain dic-

tates of economy and necessity (as in this case, where the judge who heard the evidence died, or in others where the judge's term of office expired, before decision), but by the statutory authority with which Congress has endowed the Tax Court. Under Section 1103(c) of the Internal Revenue Code (Appendix, *infra,* p. 10), the presiding judge of the Tax Court is authorized to assign one or more judges to a division and to fill vacancies occurring in the division thereafter. Where a vacancy occurs after the hearing, the statutory grant of power to the presiding judge is plainly sufficient to permit his assignment of another judge to fill it.[1]

That the exercise of this power effected no prejudice in this case is clear from the record and from taxpayer's contentions on the merits before this Court. As the court below observed (R. 45-46), the taxpayer was the sole witness at the hearing, and the determination of which he complains involved no adverse finding as to his credibility. Thus, in the substantive ruling which he attacks, there was no rejection of his testimony that he lived in Milton, Massachusetts, and took meals in Boston while engaged in business, but only a holding that, since both of these places adjoin each other as parts of

[1] It is noteworthy in this connection that the statutory scheme under which the Tax Court operates provides expressly for decision by judges who did not preside at the hearing. The provision in Section 1118(b) (Appendix, *infra,* p. 11) for review by the whole Tax Court (sixteen judges) necessarily means that most of the judges who participate in cases so reviewed will not have seen and heard the witnesses.

the Greater Boston area, the cost of meals he ate in that area could not be deducted as expenses incurred "while away from home in the pursuit of a trade or business * * *."

2. The meaning of the statute[2] allowing deduction of

> traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business * * *

was considered in *Commissioner* v. *Flowers*, 326 U. S. 465, where this Court stated that three conditions must be met before a traveling expense may be deducted: The expense must be (1) a reasonable and necessary traveling expense, (2) incurred while away from home, and (3) incurred in the pursuit of business. The Court also concluded (326 U. S. at 470) that whether particular expenditures fulfill these three conditions is "purely a question of fact in most instances." Under the established rule of this Court, concurrent findings of two lower courts on such questions are final "in the absence of very exceptional showing of error." *Tennessee Coal Co.* v. *Muscoda Local*, 321 U. S. 590, 605. No such showing is even suggested by the present petition.

Summarizing the undisputed facts, the court of appeals noted (R. 44-45) that the town of Milton,

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[2] Section 23(a), Internal Revenue Code (Appendix, *infra*, p. 9).

Massachusetts, is located ten miles from the city of Boston; that taxpayer's telephone exchange "Bluehills" is listed on the reverse side of his telephone bills as being within the "Central Offices of Boston and vicinity"; that the taxpayer "was near enough to his home so that he could return there from Boston without extensive travel." The court held (R. 44):

> We do not agree that the petitioner is "away from home" in the tax sense when he steps over the boundary of Milton. The finding of the Tax Court appears reasonable in the circumstances here.

The propriety of this holding is clear. Because of its factual nature, the problem of defining the boundaries of "home" cannot be resolved once for all cases. But it is apparent that designating a section of the metropolitan area of a large city as a "town" does not operate so to separate that section as to make the rest of the area "away from home" within the meaning of Section 23(a). As the court below stated, the very cases relied upon by taxpayer[3] "emphasize the idea that distance is an important factor in satisfying the 'while away from home' requirement" (R. 45), and that factor is not present in this case.

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[3] *Coburn* v. *Commissioner*, 138 F. 2d 763 (C.A. 2); *Flowers* v. *Commissioner*, 148 F. 2d 163 (C.A. 5), reversed, 326 U.S. 465; *Wallace* v. *Commissioner*, 144 F. 2d 407 (C.A. 9).

It can not be known by Court, tax collector, or taxpayer, which of the many cities and towns within the general area around the City of Boston are to be considered as being within and which are to be considered as being without that area. As a legal definition, the proposition below is fatally indefinite.

The petitioner therefore urges reversal of the decision below by an authoritative decision of this Court of the important question of basic revenue law involved in the second specification of error.

WHEREFORE, it is urged that the writ issue with respect to each specification of error.

Respectfully submitted,

SUMNER W. ELTON,

Attorney for Petitioner.

Whatever conflict may exist between cases defining "home" as "the equivalent of the taxpayer's place of business" and cases confining the term "to the taxpayer's actual residence" (see *Commissioner* v. *Flowers, supra,* at 471-472) is of no help to the taxpayer here. For the fully sustained finding of the courts below is that both the residence and place of business of this taxpayer are in the same—Greater Boston—area, and that he is not "away from home" while he is in that area. And so here, as in *Flowers* (see 326 U. S. at 472), there is no occasion to consider or resolve the conflict.

CONCLUSION

The decision of the court below is in all respects correct, turns on the particular facts of this case, and presents no conflict. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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Solicitor General.

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Acting Assistant
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Special Assistants to
the Attorney General.

MARCH, 1952.

APPENDIX

Internal Revenue Code:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) *Expenses.*—

(1) [As amended by Section 121(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Trade or Business Expenses.*—

(A) *In General.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

* * *

SEC. 1103. ORGANIZATION [OF THE TAX COURT] [as amended by Section 504 of the Revenue Act of 1942, c. 619, 56 Stat. 957]

* * *

(b) *Designation of presiding judge.*—The Tax Court shall at least biennially designate a member to act as presiding judge.

(c) *Divisions.*—The presiding judge may from time to time divide the Tax Court into divisions of one or more members, assign the judges of the Tax Court thereto, and in case of a division of more than one judge, designate the chief thereof. If a division, as a result of a vacancy or the absence or inability of a judge assigned thereto to serve thereon, is composed of less than the number of judges designated for the division, the presiding judge may assign other judges to the division or direct the division to proceed with the transaction of business without awaiting any additional assignment of judges thereto.

* * *

SEC. 1117. REPORTS AND DECISIONS.

(a) *Requirement.*—A report upon any proceeding instituted before the Tax Court and a decision thereon shall be made as quickly as practicable. The decision shall be made by a judge in accordance with the report of the Tax Court, and such decision so made shall, when entered, be the decision of the Tax Court.

(b) *Inclusion of Findings of Fact or Opinions in Report.*—It shall be the duty of the Tax Court and of each division to include in its report upon any proceeding its findings of fact or opinion

or memorandum opinion. The Tax Court shall report in writing all its findings of fact, opinions and memorandum opinions.

* * *

SEC. 1118. PROVISIONS OF SPECIAL APPLICATION TO DIVISIONS.

(a) *Hearings, Determinations, and Reports.*—A division shall hear, and make a determination upon, any proceeding instituted before the Tax Court and any motion in connection therewith, assigned to such division by the presiding judge, and shall make a report of any such determination which constitutes its final disposition of the proceeding.

(b) *Effect of Action by a Division.*—The report of the division shall become the report of the Tax Court within 30 days after such report by the division, unless within such period the presiding judge has directed that such report shall be reviewed by the Tax Court. Any preliminary action by a division which does not form the basis for the entry of the final decision shall not be subject to review by the Tax Court except in accordance with such rules as the Tax Court may prescribe. The report of a division shall not be a part of the record in any case in which the presiding judge directs that such report shall be reviewed by the Tax Court.

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